CHIN SIEW CHIN

v.

LIM HENG CHOO

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[SUIT NO: S-22-232-2007-I]
30 MARCH 2009

CIVIL PROCEDURE: *Striking out - Plaintiff's claim for breach of oral agreement - Agreement allegedly to share law firm's income with partner of plaintiff's deceased husband before "cut-off" date - Whether triable issues of fact and law disclosed not warranting striking out - Rules of the High Court 1980, O. 18 r. 19*

This was the defendant's application to strike out the plaintiff's suit under O. 18 r. 19 of the Rules of the High Court 1980. The plaintiff was the administrator of the estate of her late husband who had been murdered. The plaintiff's husband and the defendant were partners of a law firm. The plaintiff herself had worked in the firm but ceased working therein after the demise of her husband. The plaintiff claimed that she transferred her husband's half share in the law firm to the defendant vide a memorandum of transfer upon the defendant's advice to do so as to avoid liability in the event the firm was sued for negligence. In consideration of transferring the half share, she was promised, by way of an oral agreement, half all fees collected or due to be collected by the firm in respect of all files opened or retainers received before an agreed "cut-off" date. The plaintiff claimed that the defendant breached the oral agreement by failing and refusing to account and pay for the agreed half share of the said fees. She alleged that the oral agreement constituted an oral collateral contract to the agreement to transfer the half share in the firm to the defendant. She then filed this suit against the defendant. The defendant, in striking out the plaintiff's suit claimed, *inter alia*, the following: (1) that all monies owing to the plaintiff's late husband had been settled; (2) that the firm had been changed to sole proprietorship and as such there was no claim against the firm by the plaintiff; (3) that the oral agreement was inconsistent with the memorandum of transfer and contravened the rule against parol evidence under ss. 91 and 92 of the Evidence Act 1950; and (4) that the plaintiff failed to plead "collateral" contract.

Held (dismissing application for striking out):

(1) There were issues of fact and law that were eminently triable. The plaintiff did not deny that she had transferred half share in the firm to the defendant for a consideration of RM1 *vide* the memorandum of transfer. She also did not deny receiving some of the payments that the defendant alleged had finally settled the accounts between them. On the face of it, the single paragraphed memorandum of transfer did not appear to be a comprehensive agreement that precluded the plaintiff from alleging that the parties entered into a collateral oral contract. The fact that the defendant paid some monies to the plaintiff, as evidenced in the relevant settlement of account, might support the existence of an oral contract between the parties. Otherwise, it would appear that for the consideration of RM1 the plaintiff had transferred the entire half share of the firm to the defendant. Moreover, the plaintiff's signing of the settlement of account appeared to be an acknowledgement of the monies and properties the plaintiff received from the firm. There was no clause in it that stated that the plaintiff had no further claim on the firm. (para 7)

(2) The plaintiff's case was that there was an agreement to share income from files opened before the "cut-off" date. The defendant argued that the plaintiff could not seek an order for an account as the partnership was dissolved upon the death of one of the partners. The plaintiff cited provisions from the Partnership Act 1961 to argue that even if the partnership was dissolved upon the death of one of the partners, the profits of the partnership must be properly accounted for to the estate or personal representative of the deceased partner. Even if the prayer for the order to account was technically not correct since the partnership was dissolved, the plaintiff also prayed for damages to be assessed and her basis was the oral contract she allegedly entered into with the defendant. Therefore, that was not a ground to strike out the entire suit of the plaintiff. (para 7)

(3) The plaintiff pleaded sufficient facts to tender evidence that the oral contract was a collateral contract. The relevant paragraphs of the statement of claim clearly deposed that the plaintiff agreed to transfer her husband's half share of the firm

to the defendant in exchange for half the fees from files opened before the "cut-off" date. That was in essence a plea to support the existence of a collateral contract. Whether she would succeed in proving the alleged contract or not was another matter but contrary to the defendant's submission, it was properly pleaded. (para 8)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Tuan Hj Ishak Ismail & Ors v. Leong Hup Holdings Bhd and Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 91, 92

Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Shankar Ram; M/s Thomas, Shankar Ram & Advoc
For the defendant - Roger Chin; M/s Roger Chin & Co

Reported by Usha Thiagarajah

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an application by the defendant to strike out the plaintiff's claim under O. 18 r. 19 of Rules of High Court 1980.

Background Facts

[2] The defendant and the plaintiff's husband were partners in a law firm. The plaintiff herself worked in the said law firm. She ceased working in the law firm after the demise of her husband who was murdered. The plaintiff became the administratrix of the estate of her husband and this suit is filed in that capacity. She has filed this instant suit against the erstwhile partner of the husband for the following reasons. After the untimely death of her husband, she said that she came to rely on the advice of the defendant in respect of her finances. She was allegedly advised to transfer half share of the law firm to the defendant as she was told that she would become liable under partnership law in the event the firm was sued for negligence. Accordingly a deed (memorandum of transfer) was executed to transfer half share of

A the firm to the defendant. The plaintiff claimed that in consideration of transferring half share of the firm to the defendant, she was promised half of all fees that are collected or will be collected by the law firm in respect of all files opened or retainers received before the "cut-off" date which is the date of
B the alleged oral agreement. Her counsel has submitted that this constituted an oral collateral contract to the agreement to transfer the half share in the law firm to the defendant. In the statement of claim, she listed the monies that she had received and she also listed some of the cases for which monies had been paid to the
C firm but for which she did not receive her share. The plaintiff alleges that the defendant breached the oral agreement by failing and refusing to account and pay the agreed half share of fees that the firm continued to receive in respect of files opened and fees received before the cut-off date. In this suit the plaintiff seeks an
D order that the defendant give an account of the same, damages, interests and costs.

Striking Out Application

E **[3]** The defendant has filed the application to strike out the writ of summons and statement of claim on the ground that there is no reasonable cause of action, that the action is frivolous and abuse of the process of the court. The defendant's defence is that all monies that were owing to the late Fabian Lim or the plaintiff
F had been settled. He deposed that:

1. RM360,000 was paid to the plaintiff from the Jackson David Jones case.

2. He assigned a condominium (Unit 9C, Block 2, Tanjong Batu,
G Bintulu) from the firm to the estate.

3. He paid RM40,695.33 being cash assets and travelling claims of the late Fabian Lim to the plaintiff.

[4] Therefore, according to the defendant the character of the
H firm changed to sole-proprietorship and there is no claim against the firm by the plaintiff. Consequently there is no basis for the alleged oral agreement that the defendant has a share in the collection of fees for all files opened before the "cut-off" date. The defendant has also filed a counter claim. He has pleaded that the
I plaintiff was in control of the finances of the firm as an employee. In that capacity she collected fees and has allegedly failed to

render true accounts of collections since the inception of the firm from 1997 to 2005. The defendant is therefore seeking an order among other things, for an order that the plaintiff account for fees collected for all files opened by the late Fabian Lim and the plaintiff before 18 February 2005.

Whether Suitable Case For Striking Out?

[5] It is trite law that recourse to the special jurisdiction of striking out a pleading should be had only in plain and obvious cases where there is no sustainable cause of action or defence (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7). Based on the pleadings and the affidavits, the defendant has submitted several grounds to urge the court to strike out the plaintiff's suit. Learned counsel for defendant also argued that the court can strike out the case even if a long and elaborate hearing was necessary before deciding there was no cause of action (*Tuan Haji Ishak bin Ismail & Ors v. Leong Hup Holdings Bhd and Other Appeals* [1996] 1 CLJ 393). In considering the grounds canvassed by the plaintiff, I bear in mind that striking out a pleading is a drastic measure which would shut out a party from having his day in court. I agree that if the issues that arise from the application can be resolved and determined from the examination of the pleadings and affidavits, the court can exercise the jurisdiction to strike out a case regardless of the seeming complexity of the case. However, if the material issues can only be determined upon a proper trial with *viva voce* evidence, the case may not be so plain and obvious to justify the invoking of the special jurisdiction under O. 18 r. 19 of the Rules of High Court 1980.

[6] The grounds relied by the defendant can be briefly stated as follows:

1. That the claim of an oral agreement is inconsistent with the memorandum of transfer of the half share of the firm.

2. That the firm was dissolved upon the death of Mr. Fabian Lim.

3. That the pleadings do not disclose a reasonable cause of action for want of certainties.

A 4. That the prayer for an account is based on the partnership agreement and not on the alleged oral agreement. The prayer is therefore misconceived.

[7] After having given due consideration to the arguments raised B by counsel for defendant, I am of the opinion that this is not a suitable case for striking out. All the above grounds disclose issues of fact as well as law that are eminently triable. The plaintiff did not deny that she had transferred half share in the firm to the defendant for a consideration of RM1 *vide* the memorandum of C transfer that was exhibited in the second affidavit in opposition. She also did not deny receiving some of the payments that the defendant alleged had finally settled the accounts between them. On the face of it, the single paragraph memorandum of transfer does not appear to be a comprehensive agreement that precludes D the plaintiff from alleging that parties had entered into a collateral oral contract. In fact as counsel for plaintiff had argued, the fact that the defendant paid some monies to the plaintiff (as evidenced by the "settlement of account", exhibited as LHC5 in the defendant's affidavit in opposition) may support the existence of E an oral contract between the parties. Otherwise, it would appear that for the consideration of RM1 the plaintiff had transferred the entire half share of the firm in which her late husband was a partner to the defendant. Moreover exh. LHC5 which the plaintiff signed appears to be an acknowledgement of the monies and F properties that the plaintiff received from the firm. There is no clause in it that states that the plaintiff will have no further claim on the firm. The plaintiff's case is that there was an agreement to share income from files opened before the "cut-off" date. The defendant has argued that the plaintiff cannot seek and order for G an account as the partnership has been dissolved upon the death of the plaintiff's husband. Counsel for plaintiff has cited provisions from the Partnership Act 1961 to argue that even if the partnership was dissolved upon death of one the partners, the profits of the partnership must be properly accounted for to the H estate or personal representative of the deceased partner. Even if, for the sake of argument, the prayer for the order to account is technically incorrect as the partnership has been dissolved, the plaintiff has also prayed for damages to be assessed and her basis is the oral contract that she alleged entered into with the I defendant. Therefore this is not a ground to strike out the entire suit of the plaintiff.

[8] Counsel for defendant also argued the tendering of evidence on the oral contract would contradict the memorandum of transfer which does not refer to any consideration apart from RM1. Counsel referred to the rule against tendering parol evidence to contradict a written contract under s. 91 and 92 of the Evidence Act 1950. He further argued that the plaintiff failed to plead "collateral" contract, ie, that the oral contract was "collateral" because she signed away her share of the firm in exchange for shared income from the files opened before the "cut-off" date. I am of the opinion that sufficient facts have been pleaded to enable the plaintiff to tender evidence that the said oral contract was a collateral contract. In para 4 and 5 of the statement of claim, the plaintiff has very clearly deposed that she agreed to transfer half share of the firm to the defendant in exchange for half the fees from files opened before the 'cut-off' date. This is in essence a plea to support the existence of a collateral contract. Whether she would succeed in proving the alleged contract or not is another matter but contrary to the submission of learned counsel for defendant, it has been properly pleaded.

[9] In conclusion, the defendant has completely failed to demonstrate that the plaintiff does not have sustainable cause of action or that the suit is an abuse of the process of the court. I dismiss the application for striking out with costs.